

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT PLUMA,

Plaintiff,

-against-

THE CITY OF NEW YORK, a municipal entity; NEW YORK CITY POLICE SERGEANT CARL SORECO, NEW YORK CITY POLICE OFFICER MEGHAN O'LEARY, NEW YORK CITY POLICE OFFICER CHRISTOPHR VEGA, MEMBER OF SERVICE DUNLOP, POLICE OFFICER RAMON HERNANDEZ, POLICE OFFICER ANTHONY PONS, POLICE OFFICER RICHARD McGUIRE, POLICE OFFICER ANTHONY BARBIERI, SERGEANT DANIEL O'GRADY, SERGEANT BENJAMIN BELLINGERI, MEMBER OF SERVICE VINCENT SETTEDUCATO, MEMBER OF SERVICE COREY WHITE, POLICE OFFICER DANA PALOMO, CAPTAIN JOHN DUFFY, CAPTAIN FALCON, "JOHN DOE SECOND PEPPER SPRAY OFFICER", JOHN DOE BALDING SENIOR OFFICER, and JOHN DOE P.O. VEGA SUPERVISORS 1-4,

Defendants,

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**DECLARATION OF
ANDREW LUCAS IN
SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS**

13 CV 2017 (LAP)

ANDREW LUCAS declares, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the following is true and correct:

I am an Assistant Corporation Counsel in the Office of Zachary Carter, Corporation Counsel of the City of New York, attorney for defendants City of New York, Carl Soreco, Meghan O'Leary, and Christopher Vega, as such, I am familiar with the facts stated below. I submit this declaration in support of defendants' Motion to Dismiss the Second

Amended Complaint pursuant to Rule 12(b)(1), 12(b)(6), and 12(f) of the Federal Rules of Civil Procedure.

1. Annexed as Exhibit “A” is a copy of plaintiff’s Complaint filed March 26, 2013, docket entry [1]. Plaintiff brought Constitutional claims under the First, Fourth and Fourteenth Amendments as well as common law claims.

2. Annexed as Exhibit “B” is a copy of the Court’s March 31, 2015 decision on defendant City of New York’s motion to dismiss the complaint under Fed. R. Civ. P. 12 (c), docket entry [17]. In that decision the Court dismissed plaintiff’s causes of action under the First Amendment and for municipal liability. His Fourth Amendment excessive force, failure to intervene claim, and various state claims remained ongoing. As no individual defendants had been brought into the suit, no qualified immunity argument could be set forth at that time.

3. Annexed as Exhibit “C” is a copy of plaintiff’s First Amended Complaint, filed on April 3, 2015, docket entry [19]. There plaintiff named eleven identified and unidentified defendants, as well as “John Does 1-50.”

4. Annexed as Exhibit “D” is a copy of plaintiff’s proposed Amended Complaint, filed on April 10, 2015, docket entry [41]. Plaintiff included twenty exhibits with this proposed Complaint, several of which were multiple pages in length. Docket entries [41-2]-[41-21]. The exhibits consist of 98 video stills from different videos of Zuccotti Park on December 31, 2011. This Complaint also included Exhibit T, docket entry [41-21], the video stills from November 17, 2011, that plaintiff was ordered to strike from the complaint at the April 15, 2015 conference. In this Complaint plaintiff identified a proposed twenty five defendants, along with an additional sixty six John/Jane doe defendants.

5. Annexed as Exhibit “E” is a copy of plaintiff’s Second Amended Complaint, filed on June 23, 2015, docket entry [54]. Here plaintiff has attached three exhibits from different videos taken in Zuccotti Park on December 31, 2011. He has also identified twenty defendants in this current version of the complaint, though without setting forth specific allegations as to every defendant.¹ Plaintiff’s claims sound under § 1983 in the Fourth Amendment for the use of force and failure to intervene as well as under six different state law theories.

6. Annexed as Exhibit “F” is a copy of publically available video exchanged in this matter. This is the same video that plaintiff has attached to his complaint as Exhibit C, docket entry [54-3]. Exhibit E p. 33. A still from that video taken at approximately the same moment as seen in [54-3] is attached as F2. A still showing the moment of the incident involving plaintiff is attached and filed on ECF as Exhibit F1. As the timestamps indicate, the incident plaintiff relies upon as the basis for his failure to intervene claim did not occur until after the incident with plaintiff, and therefore his failure to intervene claim must be dismissed.

7. Exhibit F also depicts the dangerous, chaotic and disorderly scene at Zuccotti Park that the few police and private security were attempting to safely manage at the time of plaintiff’s injury. This includes, *inter alia*, individuals jostling, detaching, and stealing barriers before dragging them into a pile at the center of the park. 00:25-04:00; 15:26-16:45; 38:45-39:05. It also depicts individuals defiantly cursing at officers when given numerous clear orders to get back, 16:23-16:45; 16:45-17:03, and protestors charging and swarming officers before physically pushing them out of Zuccotti Park in the minutes leading to the incident with plaintiff.

¹ Though plaintiff has set forth twenty different individual defendants the docket reflects twenty seven defendants.

00:25-04:00; 16:23-20:53. Exhibit F generally shows the police attempting to manage an unruly and sometimes violent scene while significantly outnumbered by an aggressive and confrontational crowd. 00:25-20:53. The incident involving plaintiff can be momentarily seen at 20:45-20:53. In the following minutes the crowd can be seen continuing to defy police orders, and pushing barricades into a police vehicle. 23:10-23:30.

8. Annexed as Exhibit “G” is a copy of publically available video exchanged in this matter. This is the same video that plaintiff has attached to his Second Amended Complaint as Exhibit A, docket entry [54-1]. This video shows protestors continuing to provoke police, steal barricades and the resulting incident that involved plaintiff. As both this video and plaintiff’s numbered Complaint exhibit, [54-1], show, despite plaintiffs naming twenty defendants and identifying thirteen as lifting the barricade, Exhibit E ¶ 71, no more than seven, if that, could have had contact with the barricade at issue.

9. More saliently, Exhibit G shows that the police were acting reasonably under difficult circumstances while protestors stole and destroyed barricades and defied police and security personnel at the park. As detailed in the memorandum of law, this exhibit also shows that plaintiff’s version of events is not supported by the incontrovertible record. “[W]e take as true the facts set forth in the complaint, [] to the extent they are not contradicted by the video evidence.” Garcia v. Doe, 779 F.3d 84, 87-8 (2d Cir. 2015)(citations omitted). The video still marked as G1 shows a protestor pushing a barricade back towards the crowd, despite a nearby police officer keeping it in place. That same individual can be seen struggling with officers over another barricade shortly thereafter at 00:06-00:11, and when officers get him to release the barricade officers slide it back towards the edge of the park. The video still marked as G2 and G3 show the individual on the end of the barricade that plaintiff claims he was injured by. The

protestor at the end had his arm over the top of the barricade as though he were trying to pull it away from police. Similarly, the video still at G5 shows a protestor who is momentarily obscured by the melee in the foreground, but at 00:11-00:14 appears to be pushing the barricade the plaintiff claims caused his injury into the crowd before reaching over it and detaching it from the next barricade. 00:13-00:17. G5 has the protestor circled for clarity at 00:13. The police attempting to hold the barricades in place were being set on by an aggressive crowd from all sides. When they finally deployed pepper spray the crowd largely backed off, and the officers are able to pull the barricade back towards the street before it flipped over onto the ground. Exhibit G 00:28-00:33.

10. G3 also shows the police officers standing up as protestors manipulate the barricade. G4 is a still that shows members of the crowd throwing objects, sprays and liquids at the officers as the officers respond with pepper spray. A spray can is circled for emphasis, however another liquid or spray and some small objects can also be seen thrown at officers at approximately the same moment in the video. 00:26-00:28.

11. Annexed as Exhibit “H” is a copy of publically available video exchanged in this matter. This video begins with images of protestors detaching and pulling away from the edge of the park a large number of barricades while the videographer taunts security personnel and scattered police. 00:06-00:40. Police and security attempt to recover barricades, but even as they do so, protestors approached and pull on those barricades. 00:45-01:00 and H1. As the video goes on it depicts the same interaction as Exhibit F 16:23-17:03. This includes at least three different officers giving repeated orders for the crowd to get back while protestors push into the surrounded officers. 01:21-01:55. Throughout the crowd surrounding and pushing the officers call them “Fascists” and “Nazi pigs.” 01:21-01:55. This video also shows the police being

pushed out of the park by protestors angrily chanting “Shame” as shown in Exhibit F 18:10-19:23. 01:55-02:15.

12. Annexed as Exhibit “I” is a copy of publically available video exchanged in this matter. Exhibit I shows much of the same conduct as in Exhibit F and H, but from closer up. This video begins with protestors pulling a long chain of barricades from the edge of the park into the center while officers, including Defendant O’Leary try to stop them. 00:00-00:12. In the video still at I1 you can also see what appears to be a liquid protestors throw at officers once they recovered some barricades. 00:10-00:12. Protestors can be seen pushing a barricade into officers at 01:04 before pulling a large chain of barricades back into the park. 01:15-01:35. The video still at I2 shows protestors pulling the chain of barricades away from an NYPD officer while additional protestors come to assist him. The video ends with protestors throwing objects at the police while calling them “Bloomberg’s monkeys.” Objects thrown at 01:33 and 02:12; “Bloomberg’s Monkeys” at, *inter alia*, 02:10-02:21.

13. Annexed as Exhibit “J” is a copy of publically available video exchanged in this matter. Exhibit J depicts the scene in the general vicinity of plaintiff shortly before he was injured. It was taken from behind the barricade, opposite the police. This short clip begins when protestors have already started moving the barricade that plaintiff alleges injured him. At 00:05-00:10, through the din one can hear “guys stop pushing, I don’t want to get arrested... cause I could go to jail for 25 years -” from one of the protestors assessing the criminal risk of pushing barricades into police. Meanwhile at least two protestors can be heard repeatedly and loudly urging the others to “push” the barricade or crowd towards police, and calling the police “pigs.” Exhibit J 00:00-00:17. The video still at J1 shows the arm of a protestor in the midst of throwing an object at police prior to the deployment of pepperspray. 00:12-00:14.

14. Annexed as Exhibit “K” is a copy of NYPD TARU video exchanged in this matter. This video begins with masked protestors attempting to detach barriers until warned by police minutes before the incident involving plaintiff. 00:28-00:40. Plaintiff can be briefly seen as part of the crowd pushing police out of the park at 02:09-02:11. At 02:49 and video still K1 a protestor can be seen pushing the barricade into police. The barricade pushed into police at K1 is the same barricade that plaintiff ultimately alleges causes his injury. At 02:57-03:00 and video still K2, a protestor holding a musical instrument can be seen pushing into a helmeted police officer and then angrily telling them “Hey! Don’t do that!”

15. Beginning at 02:33 until the incident plaintiff complains about police officers can be seen stolidly holding down the barrier plaintiff claims will injure him. K3, 02:33; K4, 03:05. Meanwhile the same protestor who was harassing officers and moving barricades in Exhibit F 01:12-01:40 and Exhibit G 00:06-00:11 can be seen attempting to detach the adjoining barricade in preparation for a struggle with police. 03:09-03:12. Immediately after that melee a protestor rushes forward repeatedly stating “push out.” 03:29-03:33. While the protestors attempted to detach the remaining barricades and a surging crowd of protestors pushing towards police the police remain simply trying to hold the barricades in place as they had prior to this incident. K3, K4.

16. Exhibit L is plaintiff’s second federal Complaint filed in late 2014, docket number 14 Civ. 9969 (LTS). There plaintiff names defendants Soreco, O’Leary and Vega, as well as 44 other individual defendants and fifty John Does.

17. Exhibit M is plaintiff’s state Complaint, filed in late 2014, New York County index number 162488-2014. In this action plaintiff named 92 individual defendants with none of them overlapping with the defendants in this action.

Dated: New York, New York

August 7, 2015

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